# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1660

STANLEY J. POLACK, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, a New Jersey lawyer and county court judge, admittedly (R. 242a-243a, 228a)[1] failed to file his 1962, 1963, 1964, 1965, and 1966 income tax returns until June 3, 1968, and was found guilty, after a jury trial, of having willfully failed to file those returns at the required times, in violation of Section 7203 of the Internal Revenue Code of 1954

[1] "R." references are to the appendix filed in the court of appeals.

(26 U.S.C.). He was fined $2,000 on each of the five counts.

Petitioner's explanation, as stated to the investigating agent in 1967 (R. 46a-47a), and as stated in his trial testimony (R. 262a, 270a-272a) was lack of time, due to the burden of assuming the duties of a fulltime judge in 1959, followed, in later years, by a fear of revealing his failure to file the 1962 return. Petitioner's 1955, 1956 and 1958 returns were admittedly (R. 246a-247a) not filed until September 8, 1959, and petitioner testified that he assumed he could settle his liability for 1962, 1963, 1964, 1965 and 1966 in the same manner as he had settled his liability for 1955, 1956 and 1958, namely, by payment of civil penalties and interest (R. 245a). The tax returns which petitioner filed on June 3, 1968, for the five prosecution years, *supra*, showed a total of $16,069 in taxes withheld from his judicial salary and a total of $19,271 in taxes due as computed by petitioner, and he testified that he had entertained no intent to defraud the United States and had believed that his tax liability in excess of taxes withheld would be "minimal * * * insubstantial." (R. 257a.)

There is no merit to petitioner's contention (Pet. 11-12) that the prosecutor pursued an unfair and prejudicial line of cross-examination of petitioner's character witnesses. Only one of the prosecutor's questions of which petitioner now complains was the subject of an objection in the trial court, and, as noted by the court of appeals (Pet. App. A, p. 4a), the cross-examination was "relevant to issues raised

by the appellant" and "a proper inquiry into testimony voluntarily elicited from the witnesses on direct examination." The one objection made by petitioner was to the question (R. 360a):

> Do you believe that his personal behaviour, not only upon the bench and in the performance of his judicial duties, but also in his every-day life should be beyond reproach?

The character witness on the stand, a State senator, had testified on direct examination that he had never had any regrets about having moved petitioner's name for confirmation as a judge by the State Senate (R. 353a-354a), and he later added on cross-examination that he considered petitioner's failure to file tax returns to have been "stupid but not criminal" (R. 366a). It was, therefore, no abuse of discretion for the trial judge to allow the prosecutor to probe the standards on which this witness based his testimony (R. 354a) that petitioner had a good reputation for honesty and integrity. *Michelson* v. *United States*, 335 U.S. 469, 479; *Glasser* v. *United States*, 315 U.S. 60, 83.

Petitioner contends (Pet. 12-18) that the prosecutor unfairly stressed his judicial position in his final argument to the jury. As noted by the court of appeals (Pet. App. A, p. 2a), there was no timely objection by petitioner to the prosecutor's argument, and the argument was not improper in view of petitioner's emphasis on the defense that his judicial labors had hindered him from filing timely tax returns and in view of defense testimony that peti-

tioner's omission was "stupid but not criminal" (R. 366a) and deserved only an assessed penalty (R. 340a).

Petitioner contends (Pet. 19-21) that willfulness was not sufficiently proven or accurately explained by the trial court to the jury. As noted by the court of appeals (Pet. App. A, p. 4a), however, the trial court twice gave the jury instructions on willfulness which correctly and adequately stated the law (R. 411a, 420a-421a) and petitioner's counsel made no objection to the instructions given. The trial court instructed the jury on willfulness as follows (R. 411a):

> Thus, before you can find that the defendant's failure to file in this case was wilful, you must be satisfied beyond a reasonable doubt that it was voluntary and purposeful, and with the specific intent to fail to do that which the law requires to be done, that is to say, with bad purpose, or evil motive, to either disobey or disregard the law.
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> The only bad purpose or evil motive the government must prove in this case is the deliberate intention on the part of the defendant not to file income tax returns, which he knew that he was required by law to file, in order to prevent the government from getting that which it was lawfully entitled to receive, namely, a tax return for each of the years involved in this case. Whether or not taxes were due and owing for any of the years involved is beside the point. It is the wilful failure to make a timely return that violates the law.

This instruction was a correct application of Section 7203 and of *Spies* v. *United States*, 317 U.S. 492, 495-496. And see, *Sansone* v. *United States*, 380 U.S. 343, 354.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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